FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 17, 2009

DYNAMIC ENERGY, INCORPORATED,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2007-448-R
v.	:	Order No. 7264179; 04/26/2007
	:	
SECRETARY OF LABOR	:	Mine ID 46-09062
MINE SAFETY AND HEALTH	:	Mine: Coal Mountain No. 1 Surface
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Carol Ann Marunich, Esq., Dinsmore and Shohl, Morgantown, WV, for Contestant;
Francine Serafin, Esq., U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Bulluck

In this proceeding arising under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("Mine Act" or "Act"), Dynamic Energy, Incorporated ("Dynamic") challenges the validity of an order issued pursuant to section 104(d)(2) of the Act. 30 U.S.C. § 814(d)(2). The Order alleges that Dynamic violated 30 C.F.R. § 77.1607(b), a mandatory safety standard for surface coal mines and surface work areas of underground coal mines. The standard, which applies to loading and haulage equipment, requires that "Mobile equipment operators shall have full control of the equipment while it is in motion." 30 C.F.R. § 77.1607(b).

While conducting an inspection of Dynamic's Coal Mountain No. 1 Mine, MSHA Inspector Bruce Billups observed a tractor-trailer truck being pushed up a steeply inclined haulage road by a grader. Billups believed that the truck driver was not in "full control" of the tractor-trailer during the procedure, and consequently, issued Order No. 7264179 for violation of section 77.1607(b). In addition to finding the alleged violation, Billups also found that it was a significant and substantial ("S&S") contribution to a mine safety hazard, and that it was caused by Dynamic's unwarrantable failure to comply with the standard. Dynamic contested the Order, asserting that there was no violation, or, if there was, it was not S&S or a result of unwarrantable

failure.[1] Dynamic sought temporary relief from the Order.[2] The Secretary answered, asserting that the Order was valid in all respects, and opposed temporary relief. I denied temporary relief, and scheduled the matter to be heard in Beckley, West Virginia.[3]

The issues are whether Dynamic violated section 77.1607(b) and, if so, whether the violation was the result of Dynamic's unwarrantable failure to comply with the standard.

I. Factual Background

Bruce Billups is an MSHA surface coal mine inspector, a position that he has held for over seven years. Before working for MSHA, he had 25 years of experience in the coal mining

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[1] The Order was later modified to delete the S&S finding. The unwarrantable failure finding remained.

[2] Section 105(b)(2), 30 U.S.C. §104(b)(2), of the Act provides for temporary relief from an order issued under section 104.

[3] Prior to the hearing, the Secretary moved for partial summary judgement. The Secretary argued that the violation was established on the record. The parties agreed that the grader pushed the truck up the hill and, in the Secretary's view, the act of pushing the truck meant that Dynamic "concede[d] . . . [that the truck was] assisted up the mountain." Mot. for Partial Sum. Dec. at 2 (emphasis in original). Therefore, "[t]he only issue . . . [to] be addressed . . . [is] whether the driver of the . . . truck . . . had *full control* of that truck[,]" as required by the standard. She argued that the key words of the standard are "full control" and, "[i]f a coal truck driver need[ed] assistance to navigate the road and [was] being pushed from behind by a grader, then the driver of the truck clearly [had] yielded some control of the vehicle and it cannot be said that the driver of that truck [had] 'full control' of the truck." Mot. for Partial Sum. Dec. at 2.

Dynamic countered, arguing that the motion should be denied, because the issue of whether the truck driver had "full control" over the truck was a genuine issue of material fact. In Dynamic's view, the regulation must be interpreted to harmonize, not conflict, with its objective, which is the safe operation of loading and haulage equipment. Use of the grader to assist a haulage truck does just that, by "ensuring the truck's smooth operation." Op. to Mot. for Partial Sum. Dec. at 3. The facts at hearing would show that, "[w]hile the . . . grader may give assistance, the operator of the truck [was] always in full control . . . [in] that the truck's steering and braking control [was] not compromised and . . . there [was] no danger." Op. to Mot. for Partial Sum. Dec. at 3.

I deferred ruling on the motion at that time. I now **DENY** the Secretary's Motion for Partial Summary Decision**.** As the hearing made clear, the material facts necessary to decide the issue of liability are very much in dispute.

industry. Much of his experience related to the operation of heavy mobile equipment such as "loader[s], . . . dozers, graders, [and] all different types of trucks." Tr. 13. Billups also served as a surface coal mine foreman. Tr. 14.

The contested Order had its antecedent in an event that occurred on April 25, 2007. On that date, Billups was conducting an inspection of the Coal Mountain No. 1 Mine, a surface coal mine located in Wyoming County, West Virginia. Tr. 8; see Stip. 2. Shortly after arriving at the mine, Billups observed a grader sitting close to a coal haulage truck near the bottom of the mine's main haulage road.[4] Billups approached the grader operator and asked him what he was doing. The operator told Billups that when haulage trucks lost traction and were unable to ascend to the top of the road, he moved the grader behind the trucks and pushed until the trucks regained enough traction to move on their own. Tr. 16. Billups advised the grader operator that pushing the trucks was a "bad practice." Tr. 16. He also told the operator that he would discuss the practice with the mine foreman, Kirby Bragg. Tr. 16.

Later that day, Billups met Bragg. He told Bragg that he, Billups, did not think it was a good practice to push the loaded coal trucks up the steep grade. Tr. 17. In fact, Billups indicated that he believed that the practice violated section 77.1607 (b). Billups stated, "I told him what the law was or the standard and I read it to him." Tr. 76; see also 54, 87. Billups testified that he warned Bragg that if he saw the practice repeated, he would cite the company for a violation of the regulation. Tr. 75. According to Billups, Bragg stated that he did not think that the practice was a violation, and that MSHA and the company would have to "agree to disagree." Tr. 17, 76; see also 369; Ex. 12.

Billups returned the following day to complete the inspection. Upon reaching the mine, he contacted Bragg, asked him if he would like to accompany him, and Bragg declined. Tr. 19. As Billups traveled in his car toward the area where he intended to resume the inspection, he overheard a haulage truck driver on the mine's Citizen's Band ("CB") radio system state that his truck was stuck and needed a push. Tr. 20. Billups turned his car around and headed toward the haulage road where he saw the 18-wheel truck. Tr. 20. It had lost traction and could only spin its wheels. Tr. 20. As Billups watched, he saw the grader "come down the hill, turn around, and then start to push the truck up the steep grade." Tr. 21; see Ex. R-1 through R-3. The road was very dusty and, according to Billups, much dust was thrown up by the truck's movements. Tr. 27; see Ex. R-1 through R-4. Billups did not know how fast the truck and grader were traveling during the assist, nor did he ask. He did not interrupt the assist, but instead, called Bragg on the CB radio and informed Bragg that he would issue a withdrawal order. Tr. 26, 62-63. He also contacted the truck driver and told the driver that he wanted to speak with him before he left the mine. Tr. 26.

After observing the grader operator assist the truck driver, Billups issued Order No.

[4] The gravel-surfaced road was steeply inclined. Near its midpoint was a sharp switchback. Fully loaded haulage trucks were required to ascend the road.

7264179. The Order states, in relevant part:

> The driver of the loaded Kenworth tractor trailer truck Serial No. 98526 being used at the mine to haul coal over a loose dirt and gravel roadway did not have full control of the truck while it was in motion, in that he had to be pushed upgrade by a 14H Caterpillar motor grader. It is reasonable to think that if this continues the truck driver could be injured when exposed to the hazards of bed pins breaking, or fifth wheel king pin breaking causing the cargo trailer to be shoved into the truck operator's cab area. The mine foreman of the operator was warned of this violation in a pre-inspection conference on 04-25-2007. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. R-5.

II. Findings of Fact and Conclusions of Law

A. Testimony of the Secretary's Witnesses

1. Bruce Billups

As previously noted, section 77.1607(b) requires a haulage truck driver to have "full control" of his truck while it is in motion. Billups issued the Order because, during an assist, the driver "does not have full control of the steering. He does not have full control of the braking, and he does not have full control of his acceleration." Tr. 29.

Billups explained that when the truck is being pushed and the truck driver turns the truck's wheels, "the tractor [part of the truck] is still going forward . . . and the grader is actually forcing the tractor part of the truck through the turn." This, he stated, " is known as jackknifing."[5] Tr. 35. Billups maintained that jackknifing can very easily happen when the road is composed of loose gravel and dirt, and that on April 26, such was the composition of the roadway. Tr. 35; see Ex. R-5, R-6. He also stated that the "[truck] driver . . . cannot stop as he wants to," because the force applied by the grader from behind can continue even though the truck driver applies the brakes. Tr. 34. Billups agreed, however, that the truck driver retained

[5] Jackknifing was best explained by Dynamic's expert witness, Jose Calgone. He testified that it occurs when "the trailer starts overcoming the tractor . . . . [and] the direction of the tractor and the trailer, instead of being one behind the other, starts changing angles." Tr. 363. According to Calgone, jackknifing can happen "on icy roads, abrupt maneuvers, sudden changes of direction by the driver . . . usually at highway speed." Tr. 363.

the ability to use the truck's brakes, as needed.[6] Tr. 67.

Billups also testified that when the truck driver sees an obstruction in the road, such as a large rock, he "will tend to let up on the fuel," but the grader operator will continue to push the truck. Tr. 30. Thus, the truck operator has "cede[d] . . . power from the engine when he let up to get over a rough area or obstacle." Tr. 30. "[I]f he wants to slow the truck down to go over . . . [a] hump, when he decelerates, the grader still has that driving force pushing him forward. So he [does not] have full control of the truck." Tr. 31. Such a situation is dangerous because the force from behind can put "undue pressure" on the bed-pins holding the cargo trailer to the trailer bed, and on the king-pin connecting the tractor to the trailer. Tr. 37-38. Should either the bed-pins or king-pin break, the cargo trailer can be forced into the truck's cab.[7] Tr. 37-40. Billups admitted, however, that he had no idea of the amount of mechanical force necessary for the grader operator to push the truck bed into the truck cab. Tr. 82-83. He also admitted that, after the grader finished pushing the truck, he examined the tractor-trailer and found no defects; the bed-pins and the king-pin showed no visible damage. Tr. 65-66.

With regard to other possible hazards, Billups expressed concern that the truck driver might be unable to timely stop, in the event that other equipment using the road were on a collision course with the truck. He understood that during the assist, the truck driver could not see any oncoming traffic in the "very steep" area of the road's switchback turn. Tr. 44. Therefore, the grader operator would continue to push the truck, even though the truck driver would be trying to bring the truck to a halt. Additional hazards to the truck driver included a 60-foot drop-off along one side of the road, as well as a drainage ditch or "sump hole" at the bottom of the drop-off.[8] Tr. 45-47, 49; see also 125; Ex. R-10.

Finally, Billups explained that when a grader is assisting a tractor-trailer, the grader operator and the truck driver communicate by CB radio on a channel that is different from that regularly used by equipment operators at the mine. Tr. 63. Billups expressed concern, however, that other equipment operators could interfere with the effectiveness of the communication by unintentionally overriding their designated channel. Tr. 53-54. Billups testified that there had been "a multitude of injuries associated with pushing," including injuries to drivers' necks,

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[6] The tractor-trailer's brakes were described by MSHA's expert witness, Ronald Medina, as consisting of foot operated hydraulic service brakes and spring operated parking brakes. The parking brakes are not on each wheel and, in general, the service brakes are 50% stronger than the parking brakes. Tr. 160.

[7] Although Billups admitted that he had never seen a bed-pin break as a result of a grader pushing a tractor-trailer, he maintained that he had heard about it happening "through casual conversation." Tr. 80. In fact, he stated, a front-end-loader had shoved a tractor-trailer into, and through, the cab of a truck at a mine operated by Princess Susan Coal Company near Montgomery, West Virginia. Tr. 81.

[8] Medina confirmed, however, that the roadway was "bermed." Tr. 158.

backs, and heads, as well as sprains. In his opinion, such injuries were reasonably likely to be fatal.[9] Tr. 87, 97.

Due to the warning given to Bragg on April 25 about the assist practice, Billlups found that the alleged violation, committed the next day, was the result of Dynamic's unwarrantable failure.

2. Ronald Medina

Ronald Medina, a mechanical engineer working at MSHA's Approval and Certification Center, appeared as an expert witness for the Secretary. See Tr. 102. Medina described the areas in which he specialized as "hydraulic systems and air systems such as brake systems [and] steering systems." Tr. 104. He also stated that he participated in approximately 10 to 12 MSHA accident investigations per year, in order to "evaluate the equipment . . . involved in the accident and determine if there were any equipment-related defects that contributed to the accident." Tr. 105.

In preparing for his testimony, Medina went to the mine with Inspector Billups and took measurements of the steepness and length of the road where the truck had been pushed. Tr. 106. He also reviewed photographs of the truck in question. Tr. 106. Referring to the notes and diagrams that he had made during his investigation, Medina described the subject haulage road as being composed of dirt covered with loose gravel, and connecting with a state public road used by regular car traffic. Tr. 107-09, 115. According to him, part of the road was "fairly steep," in that a 17 % grade lead to the first switchback. Tr. 109, 111. Just before the switchback, the grade increased to 18% and, as the road entered the switchback, the grade increased again to 19%. Tr. 110; Ex. R-10.

In Medina's opinion, there are several reasons why a truck driver would not have full control of a fully loaded tractor-trailer haulage truck when it is being pushed by a grader. First, if the truck driver takes his foot off of the throttle pedal, "there's still the force and the momentum of the motor grader behind him that pushes him . . . forward even though he let his foot off the throttle pedal." Tr. 112. Moreover, when the truck driver puts his foot on the brake

[9] Billups confirmed that, during his deposition, he had stated that he knew of no fatal injuries or any other injuries resulting from the practice of pushing tractor-trailor trucks with equipment. He maintained, however, that since his deposition, he had become aware of MSHA data showing that "multiple injuries" had been caused by the assist practice. Tr. 57. Medina's opinion on the likelihood of fatal injuries as a result of the maneuver was more speculative. He knew of no incidents which had lead to a fatal accident, but believed that there were circumstances in which the practice "*could* cause the driver to lose some control of the truck, and it *could* develop into a fatal accident." Tr. 162-63 (emphasis added).

pedal, the truck's brakes also have to contend with the force of the grader as it continues to push on the truck which, in turn, increases the stopping distance of the tractor-trailer. Tr. 112-13.

Pushing from behind also increases the possibility that the tractor-trailer will jackknife. Medina stated that "when the . . . grader is pushing on the back of the trailer . . . the trailer in turn pushes on the back of the tractor, so there's a possibility that . . . the vehicle will want to fold or jackknife." Tr. 113-14. The danger of jackknifing is increased if the truck spins out. Tr. 114. Because of lost traction, the tractor would not be helping in any way to propel the trailer. All of the force would be coming from the grader, which would increase the possibility that the tractor-trailer would "fold." Tr. 117. Further, as the truck is being pushed into the switchback curve, the danger of jackknifing increases. Tr. 116. Once the tractor turns into the curve, the "difference in the angle" between the tractor and the grader means that the force from the grader increases the pressure on the truck to jackknife. Tr. 117-18.

Additionally, Medina believes that the rough patches in the road are another cause for concern, in that they could cause the tractor-trailer and the grader to separate as the grader pushes the truck. When the grader reestablishes contact, both vehicles could be jarred and jostled, which could interfere with the truck driver's ability to steer, shift, and apply the brakes. Tr. 118-19.

Medina also testified that the grader, which is one third of the weight of the loaded truck, does not have the "traction to be able to control the haul truck if something went wrong and the haul truck started going backward down the slope." Tr. 119; see also 121-22, 166. This could happen if the truck's brakes fail or their holding capacity were, for some reason, diminished. Tr. 119-20, 130. Also, if the truck's U-joint breaks, the truck loses power to its rear wheels and, in Medina's opinion, "anytime a truck . . . on a very steep road . . . loses its engine power . . . that's a dangerous situation." Tr. 168. The driver might delay applying the brakes, thinking that the truck has just jumped out of gear, and the truck could begin to roll backwards, pushing the grader down the hill with it. Tr. 120-21, 128-29.

According to Medina, another potential loss of control could occur when the grader pushes the truck around the switchback curve. The grader operator may not be able to see what is in front of the truck. If another truck is approaching from the opposite direction, the truck driver may want to stop or slow down, but the grader operator would be unaware of what the truck driver faces. Consequently, the grader operator would continue pushing the truck where the truck driver does not want to go.[10] Tr. 132.

Finally, like Billups, Medina believes that an undetected defect could cause the tractor's

[10] Medina was concerned that the truck driver and grader operator would be unable to communicate fast enough via CB radio, to prevent an accident. He was also concerned about another miner "talking on" the CB channel that the pair was using. Tr. 131-32.

bed-pins or king-pin to fail as the grader pushes the truck from behind. If this were to happen, he is concerned that the trailer would be pushed into the truck's cab. Tr. 133, 153. In sum, Medina opined that the practice results in the truck driver "ced[ing] some of the control of the truck to the grader operator." Tr. 107.

B. Testimony of Dynamic's Witnesses

1. Bobby Justice

B&J Trucking Company owned the truck in question, and Bobby Justice is the owner of B&J and has driven the truck. Tr. 171-72. Justice has spent 28 years as a truck driver and he and his company have been associated with Dynamic for six or seven years. Justice testified that the practice of a grader assisting a tractor-trailer truck up a steeply graded road is common in the surface mining industry. Tr. 172. He estimated that he had driven trucks assisted by graders approximately 20 times at Dynamic's mine. He had never been advised that the practice was unsafe, nor had the drivers ever complained about safety. Tr. 172-73. He indicated that he was unaware of any accidents resulting from the practice. Tr. 186.

According to Justice, there is a difference between losing traction, which prevents further travel, and losing control, which prevents steering or stopping. Tr. 174. In his opinion, when a truck is being pushed, the truck driver "is definitely in full control"of the truck, because of full use of the throttle, brakes and steering. Tr. 175.

Justice explained his understanding of how the practice of assisting trucks works. When a truck first loses traction, a supervisor is called and informed of the problem. Tr. 180. The grader operator is then directed to go to the area where the truck has stalled and assist the truck. Tr. 180. Justice believes that everyone at the mine knows that the truck is going to be assisted, because they overhear discussions via the mine's CB system. Therefore, "everybody stops and waits on the truck to be assisted." Tr. 179. Once the grader reaches the truck, the driver and the grader operator get on the same CB channel, which means that any problems that develop during the assist will be "instantly" communicated. Tr. 180-82. The driver puts the truck in the lowest gear possible, and the grader pushes the truck until it can move on its own.[11] Tr. 175-76. Because the truck is in low gear, the truck and the grader always travel at speeds ranging from three to five miles per hour. Tr. 175, 186-87, 196-97. The low speeds mean that dust is not a problem for the truck driver or the grader operator. Tr. 186-87, 198. Normally, the assist starts at the steepest part of the road, and it lasts for no more than 30 feet before the tractor-trailer

[11] Justice maintained that he never experienced a truck coming out of gear during an assist. However, were such a thing to happen, he believes that the truck driver would simply activate the emergency brake and stop the truck. Tr. 179.

regains traction.[12] Tr. 179, 195.

The truck driver retains the ability to use his brakes. The brakes are subject to inspection on a daily basis before the truck is taken onto the road.[13] Tr. 176-78. According to Justice, if the truck's hydraulic brakes lose air and become defective, they will "lock up" and the truck will stop. Tr. 177. Justice believes that once the brakes lock, they hold the fully loaded truck, even on a 17% to 19% grade. Tr. 200-10. Therefore, the truck will not roll backward down a grade. Tr. 200-10. However, Justice acknowledged that brakes can go out of adjustment, which could affect a truck driver's ability to stop as quickly as he would like. Tr. 191. In Justice's opinion, even if, for some reason, a truck loses its brakes and starts rolling backwards, it can be stopped because the grader has good brakes and, in addition, the grader operator can lower the grader's blade. Tr. 182. In addition, if, for some reason, the truck's transmission slips out of gear into neutral on its way uphill, the truck driver would "probably just lock his truck up," by engaging the emergency brake, which would probably necessitate dumping the load. Tr. 194.

Justice testified that he has never had a truck jackknife during an assist, and that he does not understand how such a thing is possible. Tr. 185-86. Furthermore, he does not believe that a truck can go off the road while it is being assisted, because the truck driver has full control. Tr. 186.

2. <u>Derick Steele</u>

Dynamic also called as a witness Derick Steele, the driver of the truck involved in the assist in question. Steele testified that he has been driving at the mine for approximately two years. He explained the assist process from the standpoint of a haulage truck driver. He stated that he is able to determine whether he will need an assist by the way the load feels. If he thinks an assist is necessary, he will pull to the side of the road and make sure the grader operator is alerted via CB radio. After the grader reaches the truck, Steele and the grader operator, "get on the CB radio and . . . have a discussion." Tr. 206. Steele tells the grader operator what gear the truck will be in, or the grader operator tells Steele what gear the truck should be in--usually first gear or, as Steele called it, "low, low gear." Tr. 207. All other traffic on the road is stopped. Tr. 206. Once the grader begins to push the truck, Steele does not change gears. Tr. 208. The grader operator pushes until the truck gets traction. Tr. 207. While the grader operator is pushing, Steele has his foot on the throttle. Tr. 209. If he needs to communicate with the grader operator, he does so over the CB radio. Steele maintained that he never experiences any

[12] However, truck driver Derick Steele believes that a truck is usually pushed for "30 to 40 foot, 50 at the most," during an assist. Tr. 214.

[13] Grader operator Kenneth Kenneda noted that, although equipment is pre-shift examined, there are times after the examination when mechanical failure will occur during the course of the shift. Tr. 264.

bumping or jostling, because the truck and grader move as a unit. "Me and Darren help one another," he testified. "If the truck's going and the grader's going, we go. If I stop, we don't go. If he stops, we don't go. You got to help one another. It's teamwork." Tr. 210. Moreover, he has never had dust-related visibility problems during an assist, because the vehicles do not travel at speeds that would raise appreciable dust. Tr. 219. Steele also testified that when the grader is pushing the truck, he can always steer it. Further, although he has the ability to use the truck's brakes, there is no need to do so. Before the truck gets to the switchback turn, the road levels somewhat and the truck usually regains traction. Steele advises the grader operator over the CB radio that he has traction. The grader will stop pushing, Steele switches gears, and the truck pulls away. Tr. 215, 219, 223-24.

Steele stated that he does not worry about the truck going over the embankment during the assist, because the roadway is bermed and "kind of wide," and it gets wider after the curve. Tr. 216. Further, the truck has traction and is usually moving on its own by the time it reaches the spot in the road where it could roll off and end up in the sump area. Tr. 216. Additionally, Steele maintained that he is not worried about jackknifing, because he believes that if the truck stops, the grader is unable to push it. Tr. 218.

Finally, Steele testified that, although he has experienced problems with a coal haulage truck coming out of gear and with a broken U-joint, in such case, he is not concerned about the truck rolling backwards into the grader, because the truck's brakes are reliable. Tr. 226. In this regard, Steele noted that he conducts a pre-shift examination of the truck, during which he checks "the tires, the brakes, the drive lines, . . . [the] wheels and everything."[14] Tr. 227.

3. <u>Darren Kenneda</u>

Darren Kenneda, the grader operator involved in the assist maneuver at issue, was also called by Dynamic to testify. Kenneda's description of what usually happens during an assist mirrored Steele's. Tr. 236-38. Kenneda emphasized that, because the truck moves slowly, the grader and truck are always in contact and there is no bumping and jostling. Tr. 242. In addition, he has never experienced a time when he could not communicate with the truck's driver. Tr. 240. Kenneda always instructs the driver to keep his foot on the throttle, because if the driver takes his foot off, the grader will not be able to push the truck. The loaded truck is just too heavy, he testified, and without the extra help from the truck, both the truck and grader will come to a stop. Tr. 241.

Kenneda insisted that he has never experienced problems during an assist. He has never feared going off the road and over the embankment, or into the sump, because the road is

[14] He subsequently testified, however, that "anything is possible," even brake failures. Tr. 230.

"decently wide." Tr. 245-250. He stated that he has never experienced visibility problems.[15] Once the truck enters the switchback, Kenneda can see what is in front of the tractor-trailer, and if his view is obstructed and another vehicle is coming down the hill, the haulage truck driver will alert him on the CB. Tr. 264, 268. As for the possibility of jackkniffing, Kenneda does not believe that it can happen, because if the truck stops, the grader does not have enough power to move the truck. Tr. 250. For these reasons, Kenneda believes that the truck and the grader are always under control.[16]

4. <u>Kirby Bragg</u>

Mine Superintendent Kirby Bragg was the last non-expert witness for Dynamic. Bragg recalled the inspection of April 25 and 26, and testified about his view of the practice of assisting tractor-trailer trucks with graders. Bragg has worked in the mining industry since 1975. He maintained that the practice is common, and that wherever he has worked that tractor-trailers have been used to haul coal, graders have been used for assistance. Tr. 286.

Bragg described what he recalled happening on April 25:

> [Billups] noticed that the grader operator was sitting at the bottom of the hill. He asked me what the grader operator was doing. I said he was waiting there to assist some tractor-trailers in that curve area. He explained to me that he didn't think that was a good practice. And he explained to me that he didn't like that idea because he thought there was a possibility that they would not be in full control of their vehicles. And I explained to him that . . . it's a common practice that occurs elsewhere on other operations, this operation as well, and that both the truck driver and the grader operator had full control of their equipment they were running, and it was only for a short . . . distance and it was at very slow speeds.

Tr. 286; see also 292. As Bragg remembered, during the discussion, Billups made clear that he believed that the practice violated section 77.1607(b), but Bragg did not recall Billups saying that if he saw the grader assisting a tractor-trailer in the future, he would cite the company. Tr.

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[15] Kenneda maintained that the truck and grader go so slowly that they do not raise "that much" dust. Moreover, the fans that cool the engine on the front of the truck blow downward on the roadway, rather than to the side of the truck. Tr. 249.

[16] On cross examination, however, Kenneda agreed that if the truck lost its brakes and rolled back toward the grader, the grader would not be able to stop the truck. Tr. 253. Although he has never experienced a loss of brakes, he has heard about it happening to other drivers. He has also heard about problems with a U-joint breaking, problems with steering, and problems with the transmissions. Tr. 263. Further, he admitted that if the grader's engine stalled while assisting a truck, the truck would try to move forward. Tr. 254-55.

291-92. Bragg did not instruct those who worked under his supervision to discontinue the practice, because "it was an accepted practice," one that had been conducted "time and again." Tr. 292. In fact, depending on weather and road conditions, the practice was an "everyday occurrence." Tr. 293.

On April 26, when Billups told Bragg that he had seen a grader assisting a tractor-trailer and, consequently, that he would issue an order, Bragg responded that he did not think that the practice violated any regulations. Nonetheless, Bragg instructed the grader operator to discontinue the practice until further notice.[17] Tr. 297.

5. Jose Calonge

Jose Calonge testified as a tractor-trailer and transportation expert witness for Dynamic. Calonge holds a Bachelor of Science degree in mechanical engineering from the Missouri School of Mines and Metallurgy, and is a transportation consultant. Prior to becoming a consultant, he worked as the chief engineer for Fruehauf Trailers, and he has worked for approximately 40 years in the trucking industry.[18] Tr. 302-06.

In preparation for his testimony, Calonge prepared a report based on his review of documentary background materials and a trip to the mine. Tr. 304-05; Ex. C-7. Calonge testified that the practice of pushing a loaded truck is "pretty common, not only . . . in the coal industry, but a lot of industries . . . either because of the grade or because of the terrain, mud, obstacles." Tr. 305; see also 310.

For several reasons, Calonge is also of the opinion that the practice is safe. He explained that when a tractor-trailer needs an assist, it is because there is insufficient traction between the wheels of the tractor pulling the trailer up the hill. Therefore, pushing from behind overcomes the inertia holding back the truck. Tr. 310-11. Calonge described the procedure as benign. "There's no way . . . that he [the driver] cannot have control of this equipment at this very low speed . . . . everything is very controlled." Tr. 311. The slow speed allows the truck driver and the grader operator "ample time to react to any circumstance that might arise . . . ." Tr. 329. Although he agreed that the truck could jackknife because of the way the tractor and the trailer are linked together, Calonge concluded that the slow speed of the vehicles during an assist makes it "very unlikely" to happen. Tr. 322, 351-52. He also opined that the slow speed of the vehicles makes bumping and jostling a non-issue, as well. Tr. 322.

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[17] Since issuance of the Order, 18-wheel tractor-trailer trucks are no longer used to haul coal at the mine, and have been replaced by 10-wheel tandem trucks. Although the tandem trucks haul less coal than the tractor-trailers, they can ascend the hill without assistance. Tr. 262-63, 266-67.

[18] However, Calonge is not a professional engineer, and he has no prior experience in the mining industry. Tr. 333.

Calonge expressed no concern that the practice would result in the trailer being pushed into the cab of the truck as a result of the king-pin failing. He described the king-pin as a "very strong structure" that can withstand forces far in excess of those exerted during an assist. Tr. 309. In fact, he testified that it takes 210,000 pounds of force to shear a king-pin and, at most, a grader can apply between 25,000 to 30,000 pounds of force. Tr. 321. Further, Calonge did not believe that failure of the bed-pins could cause a loss of control, because the tractor is connected to the trailer by "a massive six, seven-inch diameter cylinder in front of that trailer, [and] this humongous hydraulic cylinder . . . is not going to shear." Tr. 319-20.

In Calonge's view, it only takes from 10 to 12 feet of pushing for the truck to gain traction, "otherwise, it's not going anywhere if the wheels are spinning." Tr. 345. Calonge believes that the grader does not have enough power, by itself, to push the trailer and tractor uphill when the truck has lost all traction. Tr. 345. Furthermore, from the moment the tractor-trailer begins to move, the driver has directional control, and if the driver applies the truck's brakes, the grader does not have enough power to hinder the ability of the tractor-trailer to stop. Tr. 312, 345-47. Even were the tractor-trailer to lose its service brakes, the brakes would lock instantaneously on all five axles, and the locked brakes have more than enough capacity to hold a fully loaded truck, even on a steep hill. Tr. 314-15; see also 334. Moreover, the automatic slack adjusters on the service brakes mean that the brakes are always properly adjusted.[19] Tr. 317. In addition, were the truck driver to apply the brakes and the grader were to continue pushing, the difference in weight of the tractor-trailer and the grader means that the truck would still stop. The grader simply does not have the power to overcome the weight of the truck. Tr. 318-19. Further, any time the truck moves in a direction that the driver does not want--for example, if the truck's transmission fails and the truck begins to roll backward--all the driver has to do is apply the emergency brake by pulling a lever on the dash board. Tr. 323.

Calonge admitted that his opinions regarding the truck's braking ability and the force with which the grader pushed, were not based on any mathematical calculations. Tr. 317. He justified his position by stating that "when you do this for 40 years it's second nature, you understand these things, not to have to write them and do calculations." Tr. 338.

C. <u>Fact of Violation</u>

The Secretary emphasizes that the standard requires a mobile equipment operator to have "*full control* of the equipment while it is in motion." 30 C.F.R. §77.1607(b) (emphasis added). She states that "the main issue in this case is what is 'full control' and whether or not the operator of the coal truck is maintaining 'full control' when he is being pushed from behind to get assistance up the steep grade of the haul road." Sec'y Br. at 6. The Secretary points to Billups' testimony that during the course of a push, the driver necessarily cedes some control of the tractor-trailer to the grader operator. She particularly notes Billups' testimony that during the

[19] Calonge noted that the equipment is inspected every day and is well maintained. Tr. 341-42.

assist, there are times when the driver needs to decelerate due to road conditions, but the grader continues to push the truck forward, interfering with the driver's control of the truck.[20] Sec'y Br. at 8. The Secretary states that when the driver takes his foot off of the accelerator, "the propulsion of the truck is being altered by the pushing force of the grader." Sec'y Br. at 9.

Also, according to the Secretary, the braking ability of the truck driver is compromised because when the driver applies the brakes, the grader continues to push the truck forward. Sec'y Br. at 8. Citing to Medina's testimony, the Secretary argues that if the truck driver attempts to apply the brakes while being pushed by the grader, the normal stopping distance is increased because the truck must also stop the force of the grader, which is continuing its forward thrust. Sec'y Br. at 10. Therefore, the grader causes the truck driver to "[lose] some control over [his] braking capabilities." Sec'y Br. at 10. Moreover, there is a possibility that the truck is subject to an involuntary loss of control, as the grader pushes the truck forward and the truck begins to turn through the curve of the switchback. The Secretary asserts that, "there is a possibility that the grader will push the tractor-trailer portion of the truck into a jackknife." Sec'y Br. at 8. She especially notes Medina's testimony that pushing the truck through the switchback increases the potential for jackknifing. Sec'y Br. at 10-11.

The Secretary maintains that "the plain language of the standard . . . requires that the coal truck be able to navigate the haul road under its own power and under the full control of the truck driver," and that the truck driver lacks "full control over the propulsion, braking and steering of the equipment," thus establishing the violation. Sec'y Br. at 11.

The company counters that the evidence proves that the grader operator and the coal truck operator are always in full control when the grader is assisting the tractor-trailer. Dynamic emphasizes that neither the cited grader nor truck was defective and, when Billups watched the assist, both vehicles were where their operators intended. Dynamic Br. at 3-4. The company cites *Garrett Const. Co.*, 4 FMSHRC 2202 (Dec. 1982), in which Commission Administrative Law Judge Charles Moore found that the operators of equipment that collided, nonetheless, had "full control" when their vehicles were not defective and the vehicles went where the operators intended. Dynamic Br. 3-4. Dynamic also notes that the testimony establishes that the practice of assisting haulage trucks up a grade is common in the industry. Dynamic Br. at 5.

Dynamic argues that the Secretary should be required to establish either that the inspector observed some loss of control, or that the inspector observed a hazard. Dynamic Br. at 6. All that Billups observed was a loss of traction, which is not the same as a loss of control. Dynamic Br. at 7. Moreover, according to Dynamic, the testimony establishes that the practice was safe, because of the many precautions that were in place. In particular, the slow speed of the assist rendered the truck driver and grader operator able to react to any situation that might arise.

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[20] The Secretary also notes that the same problem was identified by her expert witness, Medina. Sec'y Br. at 9.

Dynamic Br. at 7, 11. The evidence further establishes that the truck retained its braking and steering ability during the assist and, finally, that the truck driver and the grader operator were in constant communication via CB radio. Dynamic Br. at 7-8,11.

Careful review of the evidence supports the Secretary's position. The standard requires a mobile equipment operator to have "full control of the equipment while it is in motion." 30 C.F.R. §77.1607(b). "Full" is defined as "being at or of the greatest or highest degree" and "control" is defined as having the "power . . . to guide or manage." *Webster's Third New International Dictionary* (2002) at 919; 496. Thus, "full control" means having "complete" power to guide or manage. Here, the evidence shows that when an assist is in progress, as on April 26, the tractor-trailer driver does not have complete power to manage the truck. For the driver to have full control, the truck's control mechanisms--its throttle or accelerator, its brakes and its steering apparatus--must at all times be capable of management by him, and the ability to activate any one or any combination must not be ceded in any degree to a non-operator of the equipment. Rather than having full control, the facts reveal that during an assist, the tractor-trailer driver and the grader operator share control of the truck, in that both supply power that causes it to accelerate to the point where its driver can resume full management of the vehicle's acceleration.[21] The facts also establish that the tractor-trailer driver and the grader operator share control of the truck's deceleration.[22] Until the tractor-trailer reaches a speed wherein it is able to pull away from the assisting grader, its driver shares control over the acceleration and deceleration with the grader operator. Therefore, I find that the cited assist procedure violated section 77.1607(b), as alleged. [23]

D. GRAVITY

In the Secretary's view, the violation was serious, because she proved that there are many situations during an assist which can lead to a serious, even fatal, accident. She argues that visibility problems created by the dust raised during an assist can cause collisions with oncoming vehicles. Sec'y Br. at 12. Further, if the tractor-trailer's transmission "pop[s] out of gear," the

[21] I fully credit the testimony of Steele that during the assist, regaining full control of the truck's ability to accelerate requires the truck driver to keep his foot on the throttle and the grader operator to keep pushing from behind. Tr. 207-11.

[22] I fully credit the common sense opinion of the Secretary's expert, Medina, that when the truck driver takes his foot off of the throttle, the force from the grader continues to push the truck forward and, consequently, it will "take a longer time for [the tractor-trailer driver] to slow down or stop." Tr. 112.

[23] Because I have concluded that the tractor-trailer operator's loss of control over the acceleration and deceleration of the truck establishes the violation, findings with regard to the alleged loss of control of the truck's braking and steering capacity are unnecessary to resolve the issue.

truck will effectively go into neutral and start rolling backward down the hill, pushing the grader with it, possibly over the embankment and into the sump. Sec'y Br. at 13-14. Finally, the problems with steering, especially at the switchback where the driver is "intending to go in one direction but is being pushed in another," can cause the truck to jackknife. Sec'y Br. at 14. Additional risks are created by the potential failure of the tractor-trailer's U-joint, which can cause the truck to roll backwards, and failure of the truck's king and bed-pins, which can cause the truck bed to go into the cab. Sec'y Br. at 15-16.

Dynamic essentially argues that the practice was not serious, because it did not create a hazard to any Dynamic employees, including the truck driver or the grader operator.

I find that this was a moderately serious violation. The evidence establishes that the violation could lead to an accident in which the driver of the truck would be seriously, even fatally, injured. However, the evidence also establishes that the chance of such an accident was unlikely, even remote. The Commission has stated that the focus of the seriousness of a violation "is not necessarily on the reasonable likelihood of serious injury . . . but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). However, there are times, as here, when an assessment of likelihood plays a supplemental role in determining the gravity of a violation. There is no question that an accident during the assist was possible, especially an accident caused by the truck experiencing mechanical failure, resulting in the truck traveling in a direction other than that intended. In fact, as Kenneda pointed out, even though equipment is subject to a pre-shift examination every morning, there are times, nonetheless, when mechanical failure will occur. Tr. 264. I also note the testimony of Steele, who, when describing the possibility that the truck's brakes could be defective, stated that "anything is possible," despite the required examinations. Tr. 230. I agree.

The evidence fully supports a finding that, had the brakes failed, the grader could not have held the truck in place, and I find Kenneda's testimony persuasive in this regard. Tr. 241. I also find persuasive in its logic, the testimony of Medina, who explained that, in the event of the truck rolling backward and the grader operator trying to hold it by lowering his blade, the procedure would have little effect "because the blade . . . is designed to push material forward," and the additional weight on the blade would cause less weight on the grader's tires, resulting in a loss of traction. Tr. 165-66. Therefore, I credit Medina's testimony over the unsupported assertion of Justice, that lowering the blade could help stop the truck. See Tr. 182. I further note the credible testimony of Calonge, that if the truck driver had applied the brakes and the grader operator kept pushing, the tractor-trailer would have stopped shortly because the loaded truck was heavier than the grader. The grader simply did not have the power to overcome the truck's weight. Tr. 318-19. From this, I conclude that the converse is true. If the tractor-trailer had started to roll backward, the grader would not have been able to exert enough force and braking power to stop the heavier truck, even if the grader's brakes operated effectively. A tractor-trailer with inadequate or no brakes, rolling backward down the steep incline in question, would pose a hazard to not only the truck driver, but to the grader operator as well. If the truck had hit and pushed the grader or if the truck had rolled off of the road, the grader operator and/or the truck

driver could have suffered serious, or even fatal, injury.

However, as I have indicated, in analyzing the gravity of the violation, I must also take into account the record evidence that such an accident was unlikely. Although Billups believed that there was a "multitude of injuries" associated with assists, neither he nor any of the Secretary's other witnesses were able to identify any specific accidents involving a tractor-trailer with grader assist, or any injuries that occurred as a result thereof. Tr. 54. Rather, the testimony offered by the Secretary regarding such alleged injuries was general and speculative.[24] Further, although it was possible that the truck's brakes could fail, it was unlikely. The truck's owner, Bobby Justice, testified that the brakes were subject to daily inspection, and therefore, I infer that any developing brake problem was likely to be detected. Tr. 176-77. Moreover, for the brakes to give out, the automatic slack adjusters would have to totally fail--something that was possible, but not likely, given daily inspections of the brakes. See Tr. 200-01.

In addition, given the low speed of the assist, there was little chance that the tractor-trailer would jackknife. I fully credit Calonge's testimony that, although it was conceivable that the truck could jackknife, it was very unlikely. Tr. 322, 351-52, 363. I also find that a collision with another vehicle during the assist, although possible, was unlikely. As Steele testified, prior to beginning an assist, traffic is stopped on the road and equipment operators are alerted by CB that the maneuver is in progress. Tr. 206; see also 263. Furthermore, the low speed at which the assist takes place means that, in most circumstances, the truck driver and the grader operator will have ample time to react to any unexpected traffic.

Finally, I find Billups' concern, that the trailer bed can be forced into the operator's cab if the king or bed-pins break, to be unsubstantiated. Tr. 37-40. As previously noted, the Secretary did not offer any specific examples that such accidents had ever occurred under circumstances similar to those at issue. In fact, Billups admitted that he had never seen such an accident, but had only heard of the possibility "through casual conversation." Tr. 80. I reject Billups' speculation in favor of the more persuasive explanation of Calonge, that the forces during an assist are simply insufficient to cause the truck's king-pin or bed-pins to fail. Tr. 331-32. Moreover, neither Billups nor any other witnesses for the Secretary had apparent knowledge of the six to seven-inch cylinder that secured the tractor to the trailer, and I accept Calonge's opinion that the cylinder would have to shear or otherwise break in order for the trailer to go into the tractor's cab-- a contingency that, under the circumstances, was extremely unlikely. Tr. 332. For these reasons, I find that the violation was only moderately serious.

E. <u>Unwarrantable Failure</u>

[24] For example, Medina offered the opinion that jostling "could cause the driver to lose some control of the truck" and be injured, but he did not support his opinion with specific examples. Tr. 163.

In the Secretary's view, the violation occurred because of Dynamic's disregard of Billups' April 25 warning. Sec'y Br. at 17. She contends that Dynamic "completely disregarded . . . Billups' instruction and continued to operate in the same fashion" on April 26, and that the company's continuation of the procedure in the face of the warning was "highly neglectful conduct . . . meet[ing] the definitions of unwarrantable failure and reckless disregard." Sec'y Br. at 18.

Dynamic argues that if it did not commit high negligence, then "it certainly is not guilty of aggravated conduct such as that necessary to justify the inspector's unwarrantable failure finding." Dynamic Br. at 13. The company notes that both Bragg and Kenneda testified that they did not believe the practice to be a violation. Dynamic Br. at 13. It also emphasizes that no miners complained to Bragg about the practice, that Bragg knew of no injuries as a result thereof, that Dynamic never received a prior citation, and that no trucks had jackknifed or gone over a berm and into the sump. Dynamic Br. at 14.

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence . . . in relation to a violation of the Act." *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* 2003-2004; *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 193-l94 (Feb. 1991); *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 53 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure, and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent). Negligence, of course, is the failure to meet the standard of care required by the circumstances.

I conclude that the violation was not caused by Dynamic's unwarrantable failure to comply with the standard. I disagree with the Secretary's position that the company exhibited "reckless disregard" for compliance, because Bragg "completely disregarded" Billups' warning of a future citation. Tr. 17; see 54, 87; see also Sec'y Br. at 18. Although the record confirms that Billups advised Bragg that assisting tractor-trailers with graders is not a good practice, read section 77.1607(b) to Bragg, and warned Bragg that he would cite the company if he saw the practice repeated, and that the company engaged in the same conduct the following day, I am not persuaded that Dynamic's conduct amounted to "reckless disregard." See Sec'y Br. at 18. The record reveals that assisting coal haulage trucks in negotiating steep inclines was a common practice at the mine and in the industry. Tr. 172, 292-93. The company was never cited previously, nor did MSHA have any policy memoranda or public information bulletins notifying the industry of the prohibited practice. Tr. 82. As a result, when Billups and Bragg met on April 25, they honestly and openly disagreed on the interpretation of the regulation. As evidenced at hearing, strong arguments were presented by both sides as to whether the truck driver had full

control of the truck during the assist. While I am persuaded that the standard was violated, the Secretary has failed to establish that repeating the haul truck assist on the second day of the inspection, despite the inspector's warning, constituted "aggravated conduct," "reckless disregard" and/or "intentional misconduct" that rises to the level of unwarrantable failure.

The Secretary is effectively asking Dynamic to have accepted, without question, either the inspector's interpretation of the standard, or being charged with elevated negligence and the onerous consequences arising therefrom.[25] Rather than unwarrantable, I find that Bragg's failure to ensure discontinuation of the truck assist practice, or to have Dynamic's management seek modification of the standard's application to its operation, represented ordinary failure to meet the standard of care required.[26] Therefore, I assess Dynamic's negligence as moderate.

ORDER

WHEREFORE, it is **ORDERED** that the Secretary **MODIFY** section 104(d)(2) Order No. 7264179 to a citation issued pursuant to section 104(a) of the Act, 30 U.S.C. §814(a), and reduce the degree of negligence from "reckless disregard" to "moderate," within 30 days of this Decision. Upon modification of the Order, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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[25] Unwarrantable failure findings lead to closure orders and heightened penalties under section 104(d), sections 110(a)(3)(A), and 110(a)(3)(B). 30 U.S.C. §§814(d); 820(a)(3)(A); 820(a)(3)(B).

[26] Under section 101(c), an operator may obtain modification of a mandatory safety standard at its mine upon showing that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners . . . ." 30 U.S.C. §811(c).